No. 80-1215

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN FRUIT PURVEYORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture complied with the procedural requirements of 5 U.S.C. 558(c) in instituting proceedings seeking suspension of petitioner's license under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. 499b(4).

2. Whether the 44-day license suspension imposed on petitioner following 20 willful violations of the PACA was an abuse of discretion or the result of impermissible selective enforcement.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 630 F. 2d 370.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9-10) was entered on November 13, 1980, and a petition for rehearing was denied on December 11, 1980 (Pet. App. 11). The petition for a writ of certiorari was filed on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner brought this suit to overturn a 44-day suspension of its license to engage in business as a fruit and vegetable dealer under the Perishable Agricultural Commodities Act (PACA), as amended, 7 U.S.C. 499a *et seq.* In 1969, petitioner purchased 17 lots of vegetables, which are considered perishable agricultural commodities, from five sellers but failed to make full payment promptly, in violation of 7 U.S.C. 499b(4) (Pet. App. 1). After a hearing, a Department of Agriculture Judicial Officer suspended petitioner's license for 14 days. The Judicial Officer suspended this disciplinary action, however, stating that the penalty would not become effective unless, within a four-year period beginning in February 1972, petitioner knowingly failed to pay for produce within ten days of receipt (Pet. App. 1-2). See 7 C.F.R. 46.2(aa)(5). The Judicial Officer also ruled that petitioner could avoid the ten-day requirement be establishing a different payment period by express written agreement with the seller and then actually making payment as agreed (Pet. App. 2). See 7 C.F.R. 46.2(aa)(9). Petitioner did not seek judicial review of this final administrative determination.

During the 1974 crop year, petitioner orally contracted for 21 separate shipments of produce from two companies

(Pet. App. 2-3). Petitioner paid promptly for only one shipment (*id.* at 2). Subsequently, in order to liquidate petitioner's accounts, both sellers agreed to accept post-dated checks from petitioner (*id.* at 2-3). Some of these checks were returned unpaid due to insufficient funds (*ibid.*). Both sellers then filed complaints with the Secretary of Agriculture seeking reparations. See 7 U.S.C. 499f-499g. It was only after administrative adjudication of the complaints in 1976 that petitioner fully paid for the 1974 shipments it received (Pet. App. 2-3).

Thereafter, the Agricultural Marketing Service, the agency that administers the PACA, filed a complaint charging petitioner with willful failure to make full payment promptly for the 20 lots of perishable agricultural commodities petitioner received from the two sellers (Pet. App. 3). Following an evidentiary hearing, an administrative law judge found that petitioner violated 7 U.S.C. 499b and also violated the terms of the prior probationary order (Pet. App. 3). After administrative review, petitioner's license was suspended for 30 days and the prior 14-day suspension was restored.[1]

Petitioner sought review in the court of appeals. The court upheld the administrative determination that petitioner violated the statute and the probationary order in failing to pay promptly for the produce it received from the two sellers in 1974 (Pet. App. 2, 5-6). The court also rejected petitioner's argument that the agency ignored the procedures specified in 5 U.S.C. 558(c) because it had not given

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[1]The ALJ suspended petitioner's license for seven days and restored the 14-day suspension assessed for the prior violations (Pet. App. 3). On administrative appeal by both parties, the Judicial Officer adopted the ALJ's findings but concluded that petitioner manifested " 'a callous disregard for the requirements of the Act and the prior probationary order' " (Pet. App. 4). He therefore increased the suspension to 30 days to run consecutively with the restored 14-day suspension (*ibid.*). The agency had sought a 90-day suspension in addition to the 14-day reinstated suspension (Pet. App. 3).

petitioner notice of the violations and an opportunity to comply (Pet. App. 4). The court noted that under Section 558(c) "no notice is necessary if the suspension proceeding is based on willfulness" (Pet. App. 7) and that under PACA "an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements" (*ibid.*). It then ruled that "[n]o notice to [petitioner] was required in this case, [because] the finding of willfulness was correct" (*ibid.*). The court reasoned that, in light of the probationary order, "there is no possibility that [petitioner] did not know that failure to pay promptly was a violation of the regulations and the statute and that failure to obtain an express written agreement was a knowing violation of both the regulations and the 1971 order" (*ibid.*).

In addition, the court of appeals concluded that the sanction was not arbitrary or the result of impermissible selective enforcement of the statute (Pet. App. 7-8). The court remarked that the Secretary of Agriculture has broad discretion to fix an appropriate sanction and that 7 U.S.C. 499h(a) allows a license suspension for up to 90 days for each violation (Pet. App. 7). Here, the sanction imposed was entirely proper in light of petitioner's "flagrant intentional violations of the Act, the underlying regulations and the 1971 order" (*id.* at 8).

ARGUMENT

1. The proceedings leading to suspension of petitioner's license were conducted in accordance with statutory requirements. 5 U.S.C. 558(c) states that an agency generally must give notice and an opportunity to achieve compliance before instituting proceedings to suspend a license. But Section 558(c) expressly provides that this requirement is inapplicable "in cases of willfulness," *i.e.*, in cases where the conduct for which the agency seeks license suspension is

intentional. See, *e.g.*, *Koden* v. *United States Department of Justice*, 564 F. 2d 228, 234 (7th Cir. 1977); *Cargill, Inc.* v. *Hardin*, 452 F. 2d 1154, 1173 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972); *H.P. Lambert Co.* v. *Secretary of Treasury*, 354 F. 2d 819, 821 n.2 (1st Cir. 1965); *KWK Radio, Inc.* v. *FCC*, 337 F. 2d 540, 541 (D.C. Cir. 1964), cert. denied, 380 U.S. 910 (1965).

In this case, the Judicial Officer found that petitioner acted with " 'a callous disregard for the requirements of the Act and the prior probationary order' " (Pet. App. 4), and the court of appeals agreed that petitioner committed "flagrant intentional violations of the Act, the underlying regulations and the 1971 order" (*id.* at 8). Indeed, petitioner admits that it did not make full payment for the 1974 produce until 1976, after the produce sellers had instituted collection actions and final reparation orders in those cases had been issued (Pet. 6). As the court of appeals aptly concluded, "[i]n light of the 1971 order, there is no possibility that [petitioner] did not know that failure to pay promptly was a violation of the regulations and the statute and that failure to obtain an express written agreement was a knowing violation of both the regulations and the 1971 order" (Pet. App. 7). Thus, petitioner's misconduct was willful, and the notice and opportunity to comply provisions of 5 U.S.C. 558(c) were inapplicable. See, *e.g.*, *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-189 (1973); *Haltmier* v. *CFTC*, 554 F. 2d 556, 562 (2d Cir. 1977); *George Steinberg & Son, Inc.* v. *Butz*, 491 F. 2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *H.P. Lambert Co.* v. *Secretary of Treasury*, *supra*, 354 F. 2d at 821 n.2.[2]

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[2] *Economou* v. *United States Department of Agriculture*, 494 F. 2d 519 (2d Cir. 1974), cited by petitioner (Pet. 3, 12-13), does not conflict with the decision in this case. In *Economou*, the court merely held that "the finding of willfulness appears erroneous on the record taken as a

2. Petitioner's assertion that the sanction in this case resulted from "unlawful selective enforcement of the Perishable Agricultural Commodities Act" (Pet. 14-16) is wholly without merit. The court below "perceive[d] no bias on the part of the ALJ or the Judicial Officer in rendering their decisions" and "no evidence of selective enforcement" (Pet. App. 8). The disciplinary proceedings against petitioner were instituted only after two sellers filed complaints with the Secretary when private attempts to obtain payments from petitioner had failed (Pet. App. 2-3).

Nor is the suspension imposed in this case a "gross abuse of discretion" (Pet. 16). As this Court has held, "[t]he fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of the remedy.' " *Butz* v. *Glover Livestock Comm'n Co., supra*, 411 U.S. at 188-189, quoting *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612 (1946). The statute allows the Secretary to suspend a license for a period not to exceed 90 days for each violation. 7 U.S.C. 499h(a). A license may be suspended even without a finding of intentional misconduct. *Maine Potato Growers, Inc.* v. *Butz*, 540 F. 2d 518, 523 (1st Cir. 1976). Thus, given the facts of this case, which showed 20 "flagrant intentional violations of the Act" (Pet. App. 8), "the Judicial Officer was completely within his power and discretion in imposing a suspension of forty-four days"

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whole." 494 F. 2d at 519. Based upon the very different record in this case, however, the court below held that "the finding of willfulness was correct" (Pet. App. 7).

(*ibid.*).[3] See *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 414 (1958); *Haltmier* v. *CFTC*, *supra*, 554 F. 2d at 563.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]It is permissible for the Judicial Officer to increase the sanction assessed by the ALJ. See *J. Acevedo and Sons* v. *United States*, 524 F. 2d 977, 979 (5th Cir. 1975); *River Forest Pharmacy, Inc.* v. *DEA*, 501 F. 2d 1202, 1206 (7th Cir. 1974). We also note that the statute allows the Secretary to revoke (rather than merely suspend) a license for flagrant or repeated misconduct. 7 U.S.C. 499h(a).